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IN THE

Supreme Court of the United States.

October Term, 1913.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, partners, doing business as HOLLERBACH & MAY;

v.

THE UNITED STATES.

No. 250.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

GEORGE A. KING,
WILLIAM B. KING,
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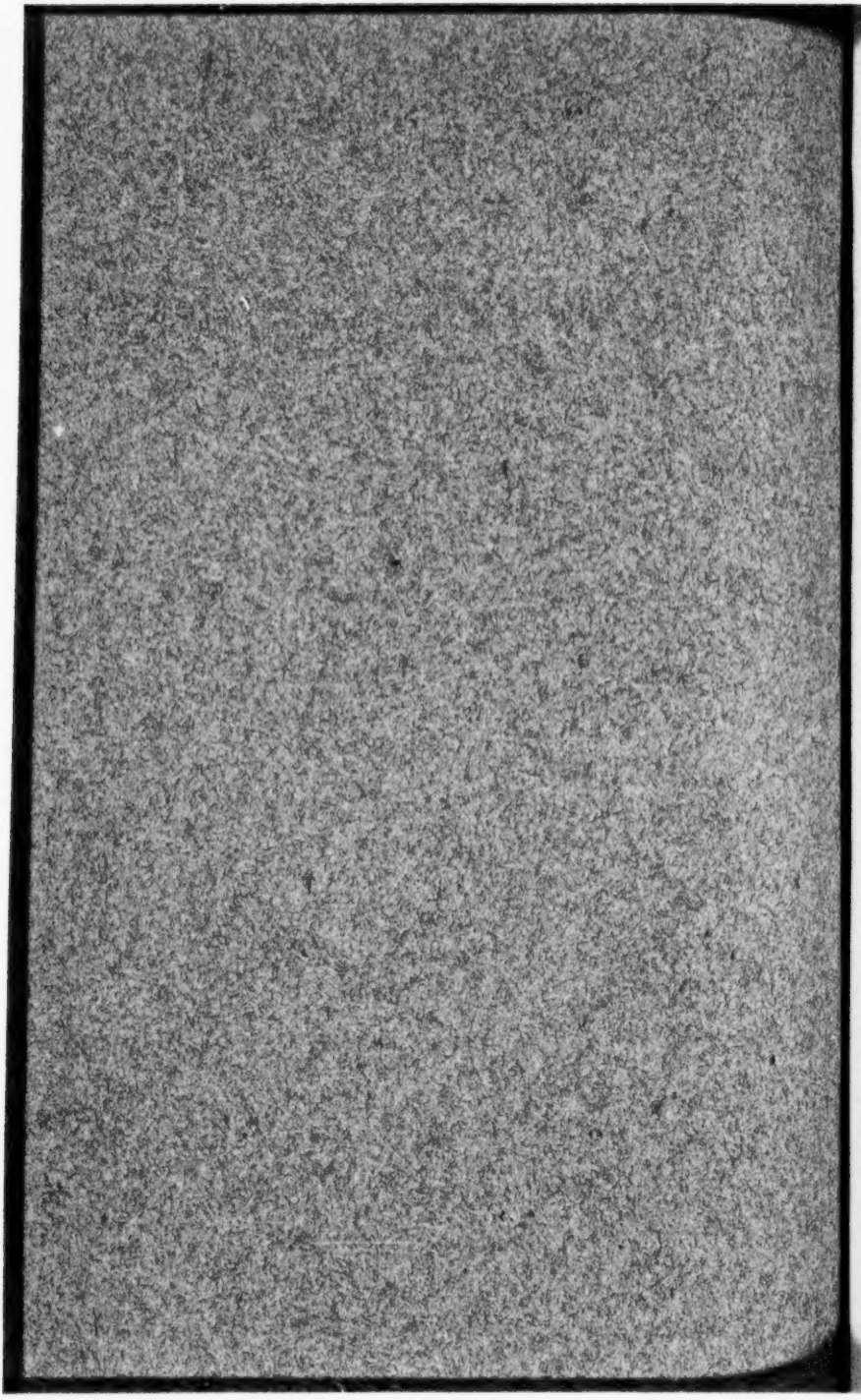
Attorneys for Appellants.



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Statement of Case.

This is an appeal from the Court of Claims. The claim is based upon a contract with the United States for the repair of Dam No. 1, Green River, Kentucky. The petition, rec. p. 5, contains five items, the first four for damages for breach of contract, the last for a portion of the contract price withheld because the United States alleges that claimants delayed the completion of the contract. The Court of Claims gave judgment for Item 1, Deficiency in Earth Excavation, rec. pp. 2, 26, 29. No appeal has been taken by the United States and that item is therefore eliminated from the consideration of this court. The Court of Claims also allowed a portion of Item 5, Deduction for Inspection, rec. pp. 4, 5, 29.

All the items now before this court depend upon a

single question arising under the following provisions of the specifications:

Par. 33, rec. pp. 9–10:

"* * * The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material."

Par. 20, rec. pp. 7–8:

"* * * Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

Par. 70, rec. p. 16:

"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

The Court of Claims has found, Finding II, rec. p. 22:

"* * * As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment as stated in paragraph 33 of the specifications, but that said backing was composed of a soft slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was

backed by crib-work of an average height of 4.3 feet consisting of sound logs filled with stones."

As the result of this condition, the court has found four items of damage suffered by claimants, which would not have been suffered had the dam been "backed with broken stone, sawdust, and sediment," as stated in par. 33. These are as follows:

Finding IV, rec. p. 23: Cost of stone procured elsewhere in lieu of broken stone from behind the dam which could have been used in the work, $2,184,08.

Finding V, rec. p. 23: Excess of cost of removing the material actually found over the cost of removing "broken stone, sawdust and sediment," $3,885.15.

Findings VII–VIII, rec. p. 24: Deductions made on account of delay caused by the extra length of time required to remove the material found over "broken stone, sawdust and sediment," $480. The last sum is the difference between the original deduction of $800 and the amount allowed by the Court of Claims on this item, $320, rec. p. 29.

The court below decided, rec. pp. 27–28, that the general language used in pars. 20 and 70 of the specifications, *ante*, p. 2, controlled and rendered nugatory the special provision of par. 33, *ante*, p. 2.

Appellants contend that par. 33 contains an express warranty not affected by the general provisions of pars. 20 and 70.

Assignment of Error.

For error in the opinion and judgment in the court below, the appellants say:

1. That said court should have held that the warranty of a special fact in par. 33 above quoted is not qualified by the general language of pars. 20 and 70.

2. That the judgment of the court below should have been in favor of the claimants for all damages and deductions suffered by reason of the falsity of said warranty.

3. That the judgment of the court below should have been for the claimant in the sum of $6,549.23, in addition to $795.63, a total of $7,344.86.

Argument.

Par. 33 Contains a Warranty.

The opinion of the court below says, rec. pp. 27, 28:

"If paragraph 33 stood alone in the contract for construction we believe the extract quoted should be regarded as a warranty as to the material backing the dam. It was a positive and material representation as to a condition presumably within the knowledge of the Government, and upon which, in the absence of any other provision or warning, the plaintiffs had a right to rely."

In support of this obviously correct position, the court cited *Atlantic Dredging Co.* v. *United States*, 35 C. Cls. 463, where the contract declared, p. 480:

"The material composing the shoals between D and E consists chiefly of sandy mud and a little gravel."

The court found the fact as follows, p. 465:

"In the course of such dredging, large quantities of stiff, sticky clay, of the character known as tenacious or hard, were found to underlie the mud and gravel upon D-E. The said shoals did not consist chiefly of sandy mud and a little gravel."

The court said of this, p. 480:

"The court is of opinion that the representation in the specification and embraced in the contract that 'the material composing the shoals between D and E consists

chiefly of sandy mud and a little gravel' is a warranty of the character of the material."

The present case is the same as that in the positive character of the warranty but it differs from it in a fact in favor of the claimants here, that they chose to complete their work.

In *Delafield* v. *Westfield*, 28 N. Y. Supp. 440, the syllabus, par. 1, says:

"At the end of the plans and specifications for proposed waterworks for defendant village was a note stating that the 'pipe line is mostly, and the tunnels are entirely, to be in soft, shale rock.' It appeared that plaintiff, whose bid for constructing the waterworks was accepted, relied in making his bid, on the representations as to the character of the excavations. *Held*, that such representations were part of the contract, and a warranty by defendant as to the quality of the excavations."

The court said, p. 443:

"While the exact route of the pipe line had not been located at the time bids were invited, the evidence tends to show that the plaintiff relied, in making his bid, upon the representation as to the character of the excavations, and assumed that it was as described in the defendant's specifications; and we think it must be held to be a part of the contract, and that it amounted to a warranty on the part of the defendant as to the quality of the excavation. It is a matter of common knowledge that in making contracts for such work the character of the material to be excavated is an important factor."

Upon appeal this view was affirmed; and it was further held that "because the excavations for the vitrified pipe line and the tunnels were in hard instead of shale rock, the plaintiff was excused for not completing his contract by the 1st of December, 1889." 41 N. Y. App. Div. 24, 28; affirmed by the Court of Appeals, 169 N. Y. 582.

The language of par. 33 is so positive a statement of a fact that the Court of Claims is plainly right in declaring it a warranty in itself.

Effect of Pars. 20 and 70.

But that court held that it was compelled "in the construction of this provision to take into account other provisions of the specifications, notably paragraphs 20 and 70," and in view of those paragraphs "the representation as to the condition back of the dam can not be regarded as a warranty," p. 28.

Appellants respond to this that the specific warranty of par. 33 is not to be annulled by any language found in pars. 20 and 70.

The bidders had before them specifications containing in two places (pars. 20 and 70, pp. 7–8, 16) general cautions requiring them to ascertain the conditions of the work, and in a third place (par. 33, pp. 9–10) a specific statement of the conditions to be found in the backing of the dam. This was under water, part of an existing government work, under the exclusive control of government officers, its condition peculiarly within their knowledge (par. 33, pp. 9–10; Finding IV, p. 22). Nothing in par. 20 requires this fact to be questioned. "The facilities and difficulties attending the execution of the proposed work including local conditions, uncertainty of weather and all other contingencies," which the bidders were there required to estimate, p. 8, can not be literally read to include a duty to investigate, or contradict a direct statement of, the condition of an existing government work two feet under water. Nor is anything in the general language of par. 70, directing the bidder to visit the site, the office of the lockmaster and of the local engineer, to ascertain the nature of the work and the general character of the river, sufficient to give notice

that the definite statement of the condition of the backing of the dam might be false. Their own sense of justice told them that the exact statement of this paragraph was not intended to be a pitfall for the unwary bidder, but the honest statement of an assured fact, peculiarly within the Government's knowledge.

Appellants assert:

(1) That, reading pars. 20, 33 and 70 together with an effort to reconcile their meaning, there is no essential inconsistency between them. Bidders might consistently accept in good faith the assurance of one particular fact stated in par. 33, and at the same time assume responsibility for investigating other facts not so certified.

(2) That, even if there is an inconsistency between these different portions of the same contract, they must be reconciled by construction in accordance with the well-settled legal maxim, *generalia specialibus non derogant*.

This maxim is interpreted by Kent, C. J., in *Munro* v. *Alaire*, 2 Caines, 327, as follows:

"If a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter."

This was quoted with approval, and applied, by this court in *Bock* v. *Perkins*, 139 U. S. 628, 636. In that case an assignment for the benefit of creditors expressed a desire to make a "fair and equitable distribution of his property" and conveyed "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule A, or intended so to be." Schedule A did not include a stock of the goods constituting the bulk of the assignor's estate. This court held, p. 635, "that

the general words in the first part of the granting clause are limited by the particular description in the latter part of the same clause of the property actually conveyed to the assignee." The court says, p. 638, that numerous cases cited, supporting this principle, "rest upon sound rules of interpretation."

The same rule is ably declared in *Lauman* v. *Young*, 31 Pa. St. 306, as follows, p. 309:

"'It is a well-settled principle, unless there be a manifest intention to the contrary, that the general provisions in a contract are controlled by the special provisions therein;' Story on Cont., Sec. 641. 'If there be a recital of a particular claim, followed by general words of relief, the general words will be qualified and restricted by the particular recital;' *id*: Sec. 643, Platt on Cov., 379. This is a common case, for why particularize if the matter is to be controlled by a general principle? There is certainly no doubt about what was the intention of the parties thus far."

The reason for the rule is ably stated by the Supreme Court of Wisconsin in *Hoffman* v. *Eastern Wisconsin Railway Co.* 134 Wis. 603, as follows, p. 607:

"The rule contended for, that particularization followed by a general expression will ordinarily be restricted to the former, is based on the fact in human experience that usually the minds of parties are addressed specially to the particularization, and that generalities, though broad enough to comprehend other fields if they stood alone, are used in contemplation of that upon which the minds of the parties are centered."

Numerous cases illustrate the principle.

In *Richmond Ice Co.* v. *Crystal Ice Co.* 99 Va. 239, there was a covenant in a deed for the lessee "to keep the plant and buildings in repair during the term of this lease." Following this and separated only by a semi-

colon were the words "that it will replace at its own expense all glass broken during its tenancy," followed by other specific repairs to be made by the lessee. The court held that the lessee did not agree to keep the plant and buildings in repair generally but only to make the particular repairs specified, saying, p. 245:

"The meaning of all general words is restricted by more specific and particular descriptions of the subject to which they apply. To give the words 'to keep in repair' the comprehensive meaning contended for would be to treat the language immediately following as surplusage and exclude it from all consideration in determining the intention of the parties."

In *Newport Water Works* v. *Taylor*, 34 R. I. 478, a contract for furnishing water to the city of Newport required the contractor to "continuously supply said city of Newport with a full and ample quantity of fresh water to the reasonable satisfaction of said city for all the public uses of said city," specifying numerous details and ending, "and for all other public purposes." In a later portion of the contract he was required to furnish "water for fourteen spring drinking fountains of ordinary capacity and one constantly running or flowing fountain on Washington Square." It was claimed by the city that it had a right to add three other flowing fountains without extra payment, because of the general provisions of the contract. The court said, p. 488:

"The designation of this one fountain constitutes a limitation upon the contract for supplying water for a maximum price. It is a familiar rule, that in the construction of contracts, general terms are restricted and limited by particular recitals when used in connection with them."

In *Miller* v. *Wagenhauser*, 18 Mo. App. 11, a contract of dissolution of partnership recited that "said Hermann

Miller has assumed all debts and liabilities of the said firm" and he covenanted "to pay and discharge all debts of said firm as per the books thereof," and two other specified obligations. A judgment was obtained against the purchasing partner on a claim not appearing upon the books. The court held that this was not one of the debts assumed by him, saying, p. 15:

"The general terms of the preamble are restricted by the words of particular description which follow."

In *Scudder* v. *Perce*, 159 Cal. 429, a partnership agreement provided that, upon termination of the partnership, all property, including debts, should be divided between the partners, share and share alike, and that, if either party desired to terminate it at the end of one year, "after making the division hereinafter provided, the party of the first part should pay $1,000 and the party of the second part should transfer all his interests in the business and all gains of said business other than moneys and earnings collected." The plaintiff insisted upon one-half of the book accounts, beside the $1,000 thus fixed. The Supreme Court of California held that the last phrase literally limited the plaintiff to one-half of the moneys already collected and that all the moneys not collected belonged to defendant, reversing the two lower courts which had held that the general provision for an equal division controlled the specific provision. This was decided, on account of (p. 433) "the familiar rule that when general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force."

In *City of New York* v. *American Railway Traffic Co.* 121 N. Y. Supp. 221, a contract for disposition of waste materials provided that the contractor "shall take all

necessary precaution and place proper guards for the prevention of accident," and shall so operate his machinery and appliances "that accidents shall be prevented." Various provisions followed to prevent accidents and the paragraph ended:

"* * * that said contractor shall be liable for all damages to person or to property arising from his negligence or that of his employees."

Plaintiff contended that by the first part of this provision the contractor was responsible whenever an accident occurred, without regard to negligence, but the court said, p. 222:

"We think that the general and comprehensive terms in the first part of the clause are limited by the latter portion, which restricts the contractors' liability to cases by negligence. The general part of the clause, which makes the contractor liable for accidents causing loss is necessarily restricted by the specific and particular statement that the contractor is liable for accidents caused by negligence."

This was affirmed by the Appellate Division without opinion, 128 N. Y. Supp. 1118.

The case differs materially from *Simpson* v. *United States*, 172 U. S. 372, cited by the court below, rec. p. 28. In that case, there was no description of the site of the work in the specifications. No reference was made in the specifications or in the contract to the borings made by the Government. The requirement to construct the dry dock was absolute. Reference is made in the opinion (p. 381) to the fact that there was no warranty by the United States "that the soil upon which the dock was to be constructed was to be of a particular nature conforming to a plan then existing"; also (p. 382) to the fact that in the specifications "there

is not contained a word implying that a particular piece of ground in the Navy Yard having soil of a specially stable character was to be the site on which the dock was to be placed."

The case comes much nearer to *United States* v. *Stage Company*, 199 U. S. 414. A contract for postal wagon service misstated the number of elevated railroad stations. This court, in the opinion by Mr. Justice Day, said (pp. 424, 425):

"It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the Government in its advertisement had positively stated the number of stations at two. The contractor had a right to presume that the Government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the Government agents and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for Government service, that the general statement that the contractor must investigate for himself, and of non-responsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt. We think the Court of Claims correctly allowed this item."

The case is analogous to *Horgan* v. *The Mayor*, 160 N. Y. 516. There "A contract for clearing and concreting the bottom of a park lake for the city of New York contained provisions that the contractor should drain off all water from the bottom during the progress of the work, that he should furnish all pumping or bailing required for the proper prosecution of the work, and that he should satisfy himself as to the nature and amount of the work to be done, by personal examination of the location. There was an outlet pipe in the bottom of the

lake, the gate of which only was visible on the contractor's personal examination of the proposed work, but on his attempting to draw off the water thereby in the progress of the work, the underground pipe or sewer proved to be obstructed and failed to remove the water for a considerable depth " (Syllabus, paragraph 2). The court said (p. 522):

" It was, of course, impossible when the plaintiff went upon the ground to examine the proposed work to see more than the outlet gate and the size thereof; whether the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises."

And again (pp. 522, 523):

" It seems to us a strained and unjust construction that would require the plaintiff under these provisions to remove, if necessary, the entire body of water from the pond. This latter work is a subject upon which the minds of the parties could not have met, and the plaintiff in his estimates did not consider that he was called upon to pump out this great body of water lying upon an area of six acres. It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer through the outlet the city had constructed for that purpose."

In that, as in the pending case, the contractor was cautioned to satisfy himself of the nature of the work. In that case the existence of an outlet gate was treated as a binding representation to him that the lake could be drained through it. Here the contractor had a written warranty in the contract itself of the conditions in the backing of the dam. In that case the contractor recovered damages for breach of the implied warranty, notwithstanding the general caution; in this case he should *a fortiori* recover for breach of the express warranty.

No Assignment of Contract.

It was objected below that the contractors had, under Rev. Stat. Sec. 3737, forfeited all their rights by an assignment of the contract.

The facts on this subject are stated in Finding I, rec. pp. 21–22. The court below overruled this defense, rec. pp. 25–26, citing *Hobbs* v. *McLean*, 117 U. S. 567, where this court discussed fully the purpose and scope of this statute as follows, p. 575:

"Nor are the articles of partnership forbidden by Sec. 3737. They do not transfer the contract or any interest therein to the plaintiffs, and can not fairly be construed to do so. But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Sec. 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. Whart. on Ev., 2d ed., Sec. 1250; Best's Evidence, 6 Eng. Ed., 1st Am. Ed., Secs. 346, 347; *Shore* v. *Wilson*, 9 Cl. & F. 355, 397; *Moss* v. *Bainbrigge*, 18 Beav. 478; *Lorillard* v. *Clyde*, 86 N. Y. 384; *Mandal* v. *Mandal*, 28 La. Ann. 556. Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand legal or equitable against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be

held to effect a transfer of Peck's contract with the United States and to be a violation of the statute.

"We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman* v. *Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

A case substantially the same as this was *Stout, Hall & Bangs* v. *United States*, 27 C. Cls. 385, where the Court of Claims said, p. 387:

"In all these facts, however, there is no evidence of an attempt to assign the contract. Plaintiffs adopted business methods which suited them in carrying out their engagements; they did not seek to avoid responsibility toward the Government or to place another contractor in their place. A contractor has a right to make subcontracts; in the nature of things he must make them, for he must hire labor, buy material, procure transportation, and fulfill, through the agency of others, the duties imposed upon him by his undertaking. He must not attempt to transfer his responsibility to the Government; the Government having selected him as the one with whom they wish to deal, he is not free to change that position. But he has a perfect right to fulfill his contract duties in the business manner which best pleases him, provided he retain his personal responsibility and achieve the required result."

This reasoning and authority clearly show that the Court of Claims was right in overruling this defense.

Conclusion.

It is respectfully submitted:

I. Par. 33 is a positive warranty that the dam was backed with broken stone, sawdust and sediment.

II. Pars. 20 and 70, being general, must be read subject to this special provision.

III. By reason of a breach of this warranty, the claimants suffered damages of $6,549.23, in addition to the amount of $795.63, found due by the Court of Claims.

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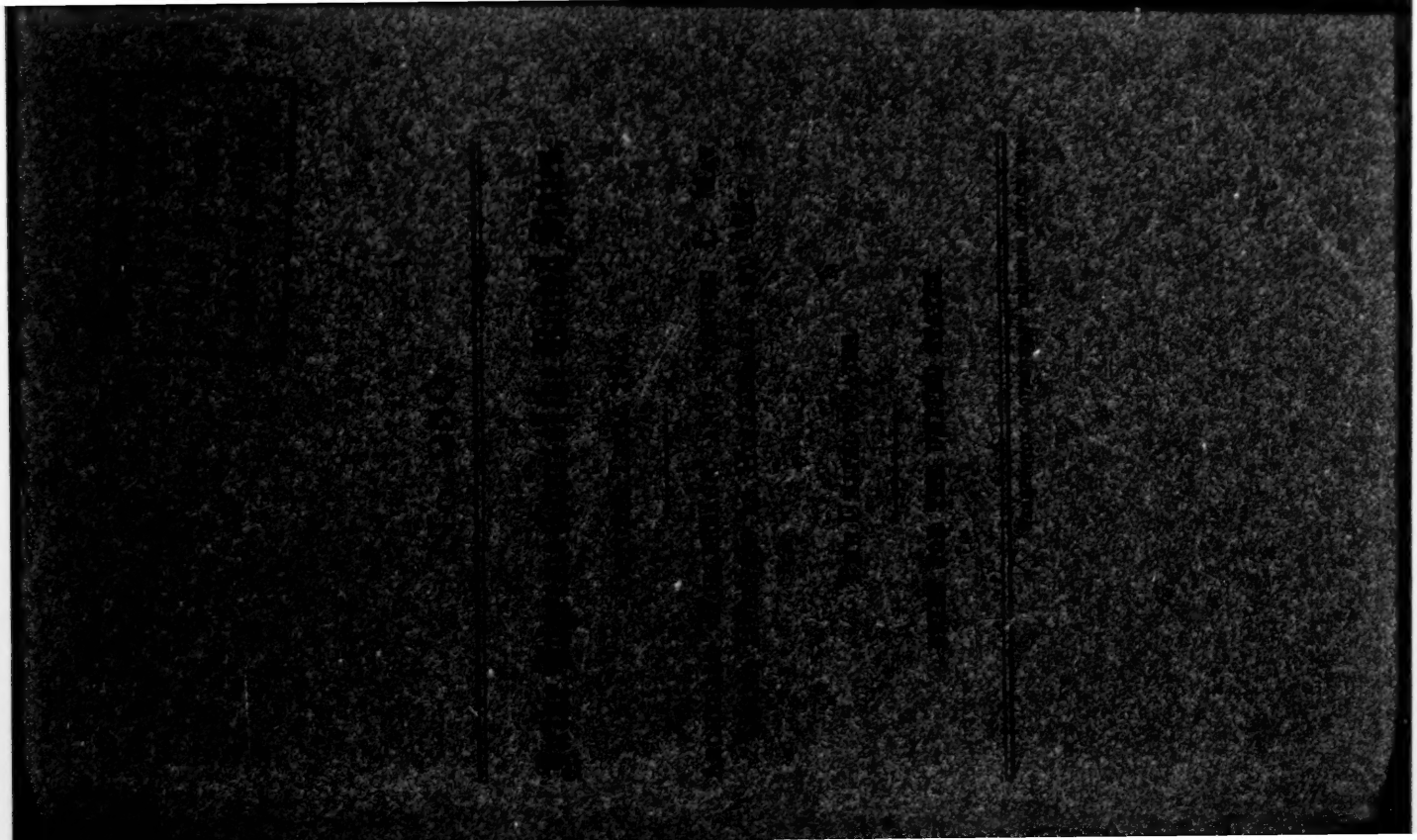

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TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ARCHIBALD HOLLERBACH AND SAMUEL L. May, doing business as Hollerbach and May, *v.* THE UNITED STATES.	No. 250.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The claim herein is based upon a contract with the United States for the repair of Dam No. 1, Green River, Kentucky. The amended petition contained five items for damages claimed in the total sum of $10,004.90. (Rec., p. 5.) The question raised involves the construction of the following provisions of the specifications:

> Par. 20, Rec., pp. 7–8. It is understood and agreed that the quantities given are ap-

proximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

Par. 33, Rec., pp. 9–10. Work to be done. * * * The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. *The dam is now* backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust

or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of *1 horizontal to 1.2 vertical will give ample room.*

Par. 60, Rec., p. 15. Blue prints. Blueprint drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

Par. 70, Rec., p. 16. Investigation. It is expected that each bidder will visit the site of this work, the office of the lock master, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal.

The Court of Claims found in part—

1. That the dam was not backed with broken stone, sawdust, and sediment, as stated in paragraph 33 of the specifications. (Findings II, Rec., p. 22.)

2. That as a result of said condition in the backing of the dam the cost of the work in question to the appellants was materially increased. (Findings IV and V, Rec., p. 23; Findings VII and VIII, Rec., pp. 24, 25.)

3. That the representation contained in paragraph 33 of the specifications must be considered in connection with the provisions contained in para-

graphs 20 and 70, and when so considered *does not constitute a warranty.* It was also decided by the court that when delay was caused by conditions other than those represented in the contract the representation did not excuse the contractor unless it amounted to a warranty, and in this case, there being no warranty, appellants were liable for, and the Government was justified in, deducting the amount of damage sustained by reason of the cost of inspection and superintendence during the period of delay, which the court found to be $320.

The court entered judgment for claimants in the total sum of $795.63. It found that appellants had been put to an additional expense of $6,549.23 over and above the said judgment, for which they have not been reimbursed. The court refused to enter judgment for this additional amount, because the contract contained no warranty which would require the Government to pay the same.

APPELLANTS' POSITION.

Appellants contend that paragraph 33 contains an express warranty not affected by the provisions of paragraphs 20 and 70.

APPELLEE'S POSITION.

Appellee insists that paragraph 33 must be considered in connection with paragraphs 20 and 70, and when so considered contains no warranty.

II.

ARGUMENT.

Paragraph 33 is modified by paragraphs 20 and 70 and contains no warranty.

The Government grounds its defense on the principle, so frequently announced by this court, that in interpreting a contract the court shall consider all of the provisions therein; the relations of the parties; their connection with the subject matter, and the circumstances under which the contract was executed.

On the other hand, appellants have selected a part of a clause in one of the provisions, and by contending that it should be read alone assert that this part of a clause contains a warranty binding the Government to pay the damages alleged to have been suffered by appellants. This clause is as follows:

> The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest.

In order to maintain this proposition it must appear that the extract above quoted is not modified by any other provision of the contract. That this is not the case clearly appears from paragraphs 20 and 70. In paragraph 20 there are two important provisions:

> (1) It is understood and agreed that the quantities given are approximate only, and

> and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same.
>
> (2) Bidders, or their authorized agents, are expected * * * to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, etc.

If these provisions mean anything they mean that bidders were to make their own estimates as to the cost of the work; that in arriving at their conclusions they were to take into consideration "the difficulties attending the execution of the proposed contract." This being true, the difficulties that might be encountered and the probable cost of the work could not be estimated by a superficial investigation. The evidence established the fact that the appellants were men of experience in work of this nature and they knew that the conditions beneath the surface could be ascertained by methods well known to the trade. They were cautioned by the terms of the contract as to this matter, and if they failed to take notice it was at their peril.

In paragraph 70 appears the following provision:

> It is expected that *each* bidder will visit the site of this work * * * and ascertain the nature of the work, the general character of the river as to floods and low water, and *obtain the information necessary to enable him to make an intelligent proposal.* (Italics ours.)

Here, again, bidders are admonished to make their own independent investigation. It will not do to say that this admonition was limited, as counsel insists, to observations of the character of the river, floods, etc., *for each bidder* was individually and specifically enjoined to "*obtain the information necessary to enable him to make an intelligent proposal.*"

It can not be contended that merely visiting the site and observing the general character of the river as to floods and low water would alone enable a bidder to make an intelligent bid. He was charged with the necessity of doing much more than that, for he was to obtain the information necessary to enable him to make an intelligent proposal. He was expected to ascertain the *nature* of the work. This certainly was notice that the bidder was to make all necessary investigation to enable him to bid intelligently for the work.

The Government freely gave bidders what information it had regarding the backing of the dam, but that was all. This was gratis and not a guarantee.

It was understood and agreed that the quantities given were *approximate only* and that no claims should be made against the United States on account of any excess or deficiency, absolute or relative.

In view of these provisions, it can be said that the extract from paragraph 33, relied upon by appellants, is not modified? Can it be contended with any degree of reason that the parties at the time

understood that the sentence referred to should be construed independently of all other provisions of the contract? The answer to each of these questions, we submit, must be in the negative.

If, then, we construe the contract as a whole, the court was not only warranted but compelled to hold that the condition of the backing of the dam was not peculiarly and only within the knowledge of the Government, but was a subject about which the appellants were expected to inform themselves, and that "the representation as to the condition back of the dam can not be regarded as a warranty." * * *

Smith & Benham v. *Curran & Hussey* (138 Fed., 150).

Shappirio v. *Goldberg* (192 U. S., 232).

Huse v. *United States* (44 C. Cls., 19–32; 222 U. S., 496).

Burgwyn v. *United States* (34 C. Cls., 348).

Lewman et al. v. *United States* (41 C. Cls., 470).

Griefen v. *United States* (43 C. Cls., 107).

Simpson & Co. v. *United States* (172 U. S., 372; 3 C. Cls., 217).

Cases quoted from by appellants to support their contention that they were warranted in relying upon representation of Government in provision 33 distinguished from case at bar.

The case largely relied upon by appellants as decisive of the question here involved is the *Atlantic Dredging Company* v. *The United States*

(35 Ct. Cls., 463). In that case, however, the representation made was clear and unmistakable. There was *no provision* in the contract *modifying or qualifying* in the least the representation as to the material to be dredged. The contract contained no cautionary provision of any kind. The case is, therefore, distinguishable from the case at bar and can not be regarded as an authority in this case.

The case of *Delafield* v. *Village of Westfield* (28 N. Y. Supp., 440; affirmed by the Court of Appeals, 169 N. Y., 582) is not an authority in this case for the same reason that the Atlantic Dredging Company case is not an authority, namely, the representation in question was not qualified in any way by other provisions of the contract.

Counsel also rely upon *United States* v. *Stage Company* (199 U. S., 414). In that case the contract for postal wagon service misstated the number of elevated railroad stations. The character of the representation in that case was very different from this case. In the Stage Company case the advertisement for proposals represented that there were *two* stations on an elevated railway. In fact there were *four* stations, requiring double the service. The contractor made no investigation prior to signing the contract, but relied upon the representations contained in the advertisement. In that case it was definitely and unequivocally stated that there were two stations to be served, no more, no less. There was no room for doubt. *There were no words, phrases, or sentences in any*

way inconsistent with the meaning of the word "two"; there was nothing to suggest to the bidder that an investigation should be made to ascertain the number of stations there were.

It is submitted that no analogy whatever exists between the two cases.

The last case referred to by counsel in support of their proposition (brief, pp. 12–13) is *Horgan* v. *The Mayor* (160 N. Y., 516). This case involved the construction of a contract for clearing a concrete bottom of a lake in Central Park, New York City. By the terms of the contract the plaintiff was required to provide all labor and materials required *for conducting the flow of water* through or across the area of the pond *to the outlet*, or for drawing water from any portion thereof, and all pumping or bailing required for the proper prosecution of the work. It was also provided that he should satisfy himself as to the nature and amount of the work to be done by a personal examination of the location. The pond had an outlet consisting of a circular gate resting on the bottom and connected by a pipe with one of the city sewers. The gate, but not the pipe, was visible to the contractor at the time he made examination of the proposed work. Shortly after the contract was executed the contractor attempted to draw off the water through the outlet, and the gate was opened for that purpose. After a portion of the water had been drawn off the pipe ceased to work. An examination disclosed that the pipe or sewer was seriously ob-

structed and that no further water could be drawn from the pond.

The engineer on behalf of the city insisted that it was the duty of the contractor to pump the water out. The contractor contended that he was not required to remove from the 6-acre pond by pumping any portion of the water that would naturally flow through the outlet pipe, which had been placed there for that purpose, if it were in order; that his duty was merely to conduct across the pond to the outlet the water, and to do such pumping as was necessary to keep the bottom of the pond clear of water while the work of laying the concrete was in progress.

In deciding the case the court said (p. 522):

> A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water in a general sense. There would, of course, be inadequacies and irregularities on the bottom where more or less water would remain and which the contractor was bound to pump out and keep clear during the progress of laying the concrete work.
>
> A careful reading of those portions of the specifications above quoted shows that the plaintiff was to drain off "all the water from the bottom during the prosecution of the work," to furnish "all labor and materials required for conducting the flow of water through or across the area of the pond or any portion thereof, and all pumping or bailing or other work required"; and also

> " all labor and materials required for conducting the flow of water through or across the area of the pond *to the outlet*, or for drawing water from any portion of the area, and all pumping or bailing required for the proper prosecution of the work during its progress and until its completion." These quotations disclose the language of limitation and show the contract did not contemplate the contractor pumping out the water of the lake in a general sense.

Then follows the last paragraph quoted by appellants (p. 13). The opinion continues (pp. 522–523):

> It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer through the outlet the city had constructed for that purpose.

It requires no comment to show conclusively that this case fails absolutely to support the position of appellants, for after all the case was decided in accordance with the rule of interpretation for which we contend, as appears from the following paragraph (p. 523):

> This construction of the contract falls within a familiar rule: " The meaning of a contract is to be gathered from a consideration of all its provisions and the inferences naturally derived therefrom as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance." (*Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y., 211; *Booth* v. *Cleveland Mill Co.*, 74 N. Y., 15–21.)

The rule as to general provisions being limited by special words considered.

It is contended by the Government that the doctrine espoused by appellants, namely, that general clauses followed by special words are limited by those special words, must give way to the general doctrine that the meaning of a contract must be interpreted from the whole instrument.

It is settled beyond controversy that effect must be given, if possible, to every part of a contract, and it is only when there is an inconsistency or repugnance which is totally irreconcilable that a discrimination will be made as to which part will be made to yield to the other.

That in this case there is no such inconsistency is too plain for argument. The various provisions of the contract under the construction of the court below gives force and effect to all the words, clauses, and sentences contained therein and makes the contract a consistent whole.

Page on Contracts, sec. 1113.
Elliott on Contracts, sec. 3665.
Sutherland on Statutory Construction, sec. 279.

The following authorities cited by appellants uphold the Government's contention that the contract must be considered as a whole.

The principle for which we contend is supported by authorities cited by appellants. By way of illustration we refer to the following cases: The case of *Hoffman* v. *Eastern Wis. R. & L. Co.* (134

Wis., 603) was an action for personal injuries received in a collision. Prior to the filing of the suit the plaintiff had given a release to the defendant on account of injuries, "being right limb contusion, head struck, shook up badly, and * * * otherwise bruised and injured." Subsequently as a result, it is said, of the injuries, it became necessary for the plaintiff to undergo a serious operation. In the court below the plaintiff recovered judgment. On appeal counsel for respondent, in discussing the release (p. 611), said:

> This is a release of the damages for injuries enumerated and the general words are limited to the particular injuries described in the release.

In reversing the case, the court in its opinion (p. 606), said:

> The trial court evidently felt constrained in his construction of the release in this case by what he termed a strict rule of law applicable thereto, to the effect that the general words of the release, acknowledging full payment and satisfaction of all claims by reason of the injuries received on defendant's car on the date named, were limited by the specification of those injuries elsewhere in the writing, and counsel now contend that there is such a strict rule of law which must constrain us, to the effect that wherever words of particular description are contained in any contract, and more particularly in a release of damages, followed

by more general words of discharge, the instrument must be construed as limited to the particular words and not extended to the full scope of the general words thereof. There is an entirely erroneous idea embodied in this contention. No rule of construction merely is a strict rule of law. In applying and enforcing any and every contract, especially when reduced to writing, it is the duty of the court to ascertain what the parties really intended by the words used in the instrument; and so-called rules of construction are but aids or suggestions resulting from common experience, to the effect that people generally, in arranging and using words, mean thus and so thereby. *In re Howes's Estate*, 103 Wis., 497, 79 N. W., 786; *Brittingham & H. L. Co. v. Manson*, 108 Wis., 221, 225, 84 N. W., 183.

Then follows the quotation found in appellant's brief (p. 8) as to the rule for which respondent contended, and in the same paragraph (but not quoted by counsel) are the following words (p. 607):

> *It is the foundation of the whole rule* nascitur a socio; *but if the contrary appear to have been the intent, courts will defeat instead of execute the real contract of the parties on blind submission to any such rule.*

In *Richmond Ice Company v. Crystal Ice Company* (99 Va., 229), also cited by appellants, the court said (p. 245):

> In the interpretation of written contracts every part of the contract must be made, if

possible, to take effect, and every word of it must be made to operate in some shape or other.

In *Bock* v. *Perkins* (139 U. S., 628), relied upon by appellants under the facts stated, there can be no doubt as to the justice of the decision. After a full consideration of the case the court said (p. 635):

> The assignment is to be determined by the general rules governing the interpretation of written instruments, the controlling one of which is that effect must be given to the intention of the parties as disclosed by the instrument to be considered.

Again (p. 637):

> But we are to take the whole instrument into consideration in order to ascertain the true intent and meaning of the parties.

The following authorities cited by appellants are distinguishable from case at bar.

In *Newport Water Works* v. *Taylor* (34 R. I., 478), to which reference is made in appellant's brief (pp. 8, 9), material facts are omitted. The facts are fairly stated in the syllabus (p. 479):

> A contract between a city and a water company provided that the company should furnish the city with water for its use for the public buildings and many specified purposes, including "fourteen spring drinking fountains of ordinary capacity, and one constantly running fountain on Washington Square," at an agreed price, and that water in addition to what was designated should be

allowed at stipulated rates, including among other purposes, "spring fountains of the kind above mentioned, at $25 a year each." Said rates were to continue until the price to be paid by the city should be equal to $10,000 a year in all, and then the city was to pay only at said last-mentioned rate, and all additional or greater use of the water should be free. "Said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said city at its pleasure."

The city council passed a resolution authorizing the erection of three fountains similar to that on Washington Square, and for several years the city paid for their use at the rate of $100 a year each, in addition to the sum of $10,000, and after a period of four years, during which no payment was made for the fountains, upon claim made therefor by the water company, appropriated the amount necessary for the payment of such claim.

In passing upon the case the court said (p. 488):

Applying the rules of construction stated above, it seems clear, that looking to the *contract as a whole* it was not the intent of the parties to include under the maximum price of $10,000 any constantly flowing fountain other than the one particularly specified.

And again (pp. 490, 491):

We are of the opinion that upon the terms of the contract, considered with reference to

> the situation and circumstances of the parties at the time of the execution thereof, and in the light of the *construction given to the contract by the conduct of the parties* since the same went into operation, only one constantly flowing fountain was contemplated by the contract as included under the maximum price of $10,000 fixed in said contract for supplying water to the city of Newport.

It is clear, we submit, that in the decision of this case the court was controlled by considering the contract as a whole and giving due weight to the *practical interpretation of the contract by the parties.*

In *Scudder* v. *Perce* (159 Cal., 429), cited by appellants (brief, p. 10), the pertinent facts are: A partnership agreement provided that upon termination of the partnership all property and debts should be divided between the partners, share and share alike. The contract contained the following provision (p. 431):

> * * * It being distinctly understood that at the expiration of said one year, as aforesaid, in case either of the parties hereto decide to terminate, and after making the division hereinbefore provided, that the party of the first part will pay to the party of the second part the sum of one thousand ($1,000) dollars; and the party of the second part shall thereupon transfer and assign to the party of the first part all his interest in and to all the office and laboratory furniture and

> fixtures and in the good will of said business and in all gains of said business *other than moneys earned and collected.*

On the dissolution of the partnership, the plaintiff, the retiring partner, insisted on one-half of the book accounts in addition to the $1,000. The controversy arose over the meaning of the language above quoted, and in particular over the meaning of the words italicized. After reviewing the arguments of counsel as to the construction of the words referred to, the court said even if it be conceded, up to that point, that the arguments were of equal weight there were certain other considerations to be adverted to to give determinate force to the construction of the contract. The court stated two rules applicable, one of which appears in appellants' brief; the other does not. They are (p. 433):

> The first of these is the familiar rule that when general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force.

And—

> The second consideration is that all parts of a contract are to be given effect if this may be done without doing violence to the manifest expressed intent of the parties, and that the terms of a contract are to be construed according to the ordinary and usual acceptation of the language unless an intent

> that they should be construed otherwise plainly appears. Appellant's construction of the contract gives to the italicized language the meaning which it naturally and ordinarily bears. The respondent's construction, on the other hand, is a distinct change in the meaning of the contract and amounts to a judicial reformation of it, by which reformation it would be made to say that there should be excepted from the transfer all moneys earned and *not collected,* when the contract itself declares that there shall be excepted from the contract only the moneys earned and actually collected.

There is no conflict between the two cases.

The same is true of *City of New York* v. *American Railway Traffic Company* (121 N. Y. supp., 222), *Miller* v. *Wagenhauser* (18 Mo. Ap., 11), *Lauman* v. *Young* (31 Pa. St., 306).

The principle applicable in this case and for which we contend has been consistently upheld by the courts, as appears from the authorities to which we have directed attention.

See also *United States* v. *Mescall* (215 U. S., 26) for construction placed upon the rule of *ejusdem generis,* involving the same general principle, and *Lindeke et al.* v. *Associate Realty Company* (146 Fed., 630), and cases there cited.

CONCLUSION.

We respectfully submit, therefore, by way of conclusion, that the judgment of the lower court, in

holding that paragraph 33 of the specifications contained no warranty, and in dismissing the petition as to all items set forth in findings other than III and VII, should be affirmed.

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